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No. 86-1862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN HANSON SAVINGS AND LOAN, INC.,
Petitioner,

v.

STATE OF MARYLAND AND STATE OF MARYLAND DEPOSIT INSURANCE FUND CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals correctly hold that the Eleventh Amendment bars a claim by a savings and loan association against the State of Maryland and the State of Maryland Deposit Insurance Fund Corporation for the return of monies needed by the State to prevent depositor losses and to remedy the effects of a statewide savings and loan crisis?

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On Petition for Writ of Certiorari to the
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

John Hanson Savings and Loan, Inc.

("John Hanson") sued the State of Maryland ("the State") and the State of Maryland Deposit Insurance Fund Corporation ("MDIF")[1/] seeking the return of monies possessed by MDIF as the successor of the Maryland Savings Share Insurance ("MSSIC"), which was an insurer of savings accounts of state-chartered savings and loan associations that included John Hanson. (App. at 2a).[2/] John Hanson had deposited monies with MSSIC for the insurance of its accounts. (App. 2a, 6a).

In May, 1985, the private insurance system for 102 Maryland savings and loan associations collapsed. The collapse was preceded by massive withdrawals from the associations insured by MSSIC. (App. at 4a-5a). In the

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[1/] Pursuant to Supreme Court Rule 28.1, MDIF is an agency of the State of Maryland with no parent companies, subsidiaries or affiliates.

[2/] Citations in the form "App. at ___" are to the appendix to John Hanson's petition for certiorari.

three-month period ending in mid-May, approximately $630 million was withdrawn from these associations. (App. at 5a).

In an effort to deal with the crisis in the MSSIC insured savings and loan associations, the Governor issued executive orders limiting withdrawals from MSSIC insured institutions and calling a special session of the Maryland General Assembly. (App. at 5a).

The special session was devoted exclusively to the savings and loan crisis and enacted various emergency laws designed to stabilize the industry and establish depositor confidence. Among the laws enacted was Chapter 6 of the Laws of 1985 (1st Special Session) which replaced MSSIC with a new State agency, MDIF, and conferred upon the latter all of MSSIC's powers, duties and insurance liabilities "to the extent consistent with the Act." The new agency also took over the two MSSIC funds which had been

financed by contributions from MSSIC member associations. (App. at 5a-6a). One of these funds, the Central Insurance Fund ("Insurance Fund"), is the subject of John Hanson's petition. 3/

The Insurance Fund had as its purpose the insurance of accounts of depositors of member associations. (App. at 7a). Under the MSSIC system, this fund was capitalized by deposits equal to two percent of the amount of each MSSIC member's savings accounts.

The MSSIC statute had been silent on the rights of member associations to the return of their contributions to the Insurance Fund. MSSIC bylaws did provide a procedure for individual institutions to obtain access

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3/ At the time it filed suit, John Hanson also sought the return of contributions made to the Central Reserve Fund. The Fourth Circuit stated that these contributions "have now been refunded, and this aspect of the litigation is moot." (App. at 2a). John Hanson concurs with this statement. Petition at 2 n.2.

to the contributions. However, even these rules contained no provision governing fund distribution in times of crisis and of contemplated losses of massive proportion; nor did they remotely envision the statutorily mandated exodus of member institutions from MSSIC into the federal insurance system and the legal dissolution of MSSIC.

Under the legislation creating MDIF, the purposes of the Insurance Fund were broadened, Md. Fin. Inst. Code Ann., §10-110(a)(2) (Supp. 1986), and the new laws specifically made the return of Insurance Fund contributions "subject to terms and conditions adopted by the Fund Director and approved by the Board." Md. Fin. Inst. Code Ann., §10-112(b) (Supp. 1986).

In light of the huge anticipated insurance losses which greatly outstripped

the Insurance Fund resources,[4/] and the clamor by savings and loans for the return of their contributions to the Fund, the MDIF Board of Directors issued the following resolution on October 24, 1985:

> Because of the extent of currently anticipated losses, MDIF will not return capital deposits in the insurance fund to withdrawing members until the amount of currently anticipated losses is determined.

(App. at 7a).

The MDIF Insurance Fund monies supplemented by huge State appropriations have been utilized to either support the sale of troubled institutions, to fund the assumption by financial institutions of liability for insured deposits, or to fund partial distributions to insured depositors. Because the

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[4/] As of May 13, 1985, the losses at one savings and loan alone were estimated to be approximately $206 million, well exceeding the total Insurance Fund amount of $175 million.

liabilities of the Fund to insured depositors greatly exceed the assets that MSSIC had required to be placed in the Fund, there will likely not be any Insurance Fund monies remaining for a distribution to former MSSIC members.

On September 19, 1985, John Hanson was accepted into FSLIC membership,[5/] and it claims it was entitled to the return of its Insurance Fund Contributions as of September 25, 1985. When John Hanson made demands for the immediate return of its Insurance Fund contributions, its request was denied because the anticipated losses to the Insurance Fund vastly exceeded the Fund's balance.

5/ John Hanson was accepted into FSLIC primarily because the State of Maryland allowed it to utilize State backed bond anticipation notes exceeding $11,000,000 to meet FSLIC's net worth requirements. Without this State supplied financial pledge, John Hanson would have been denied FSLIC membership.

John Hanson filed suit in the United States District Court for the District of Maryland. The State and MDIF moved to dismiss John Hanson's complaint on the ground, among others, that the Eleventh Amendment barred John Hanson's claim for the return of its monies. The district court agreed and entered judgment in favor of respondents. (App. at 16a-17a). On appeal, the Fourth Circuit affirmed, holding that MDIF is an agency of the State and that the Eleventh Amendment barred this action because the State did not consent to suit against MDIF in federal court. (App. at 2a-3a). John Hanson's petition to this Court followed.

REASONS FOR DENYING THE WRIT

Further review of this case is plainly unwarranted. John Hanson now asserts a new claim not asserted in either of the courts below, and the petition presents no novel or unsettled questions on which the federal

courts require the guidance of this Court. The decisions below conform with prior decisions of this Court, and no sound reason exists for disturbing the decision of the Fourth Circuit.

A. Petitioner asserts a claim not raised in the courts below.

The first question John Hanson presents for review is whether the Eleventh Amendment bars a suit in federal court against a state by one of its own citizens. Aside from the fact that this Court has directly answered this question in the affirmative on numerous occasions, see Papasan v. Allain, 106 S.Ct. 2932, 2939 (1986); Employees v. Department of Public Health & Welfare, 411 U.S. 279, 280 (1973); Hans v. Louisiana, 134 U.S. 1 (1890), John Hanson failed to raise this question below, and so has waived the right to raise it in its petition. See Dothart v. Rawlinson, 433 U.S. 321, 323 n.1 (1977);

Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970); see also Irvine v. California, 347 U.S. 128, 129 (1954).

B. The Fourth Circuit's decision holding that petitioner's suit is barred by the Eleventh Amendment is unquestionably correct and is in full accord with numerous decisions of this Court.

The Eleventh Amendment to the United States Constitution prevents a state or its agencies and entities from being sued in federal court without their consent. Ex parte State of New York No. 1, 256 U.S. 490, 497 (1921). It precludes the assertion of state law claims as well as federal claims, Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984); equitable relief as well as legal and monetary relief, Corey v. White, 457 U.S. 85, 91 (1982); has been held to bar actions against a state for violations of the Contract Clause, Hans v. Louisiana, 134 U.S. 1 (1890); and the

Commerce Clause, Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); and "bars suits against a State by citizens of that same State as well." Papasan v. Allain, 106 S.Ct. at 2939.

John Hanson can only survive this constitutional bar if this suit were really not one against the State or its alter ego or if the State had waived its immunity. However, the petitioner cannot mount a credible position on either count and the courts below properly found this suit barred by the Eleventh Amendment.

1. MDIF is an Agency of the State of Maryland.

John Hanson did not sue an officer or a person, but filed this action directly against the State of Maryland and MDIF. It argues at length that MSSIC, the statutory predecessor of MDIF, was not a State agency. However, by the time its claim arose

and its action was filed in federal court, MSSIC was insolvent and had been abolished by the State legislature which established MDIF, a State agency, as its successor.

MDIF, the entity the General Assembly of Maryland created out of MSSIC's ashes, bears every indicia of a State agency. MDIF was created by law and placed within a principal department of State government, the Department of Licensing and Regulation, Md. Code Ann., Art. 41, §8-102. It is subject to direct and extensive governmental control. MDIF and its Fund Director are appointed by the Governor and/or the Secretary of Licensing and Regulation. Md. Fin. Inst. Code Ann., §10-103 (Supp. 1986). Its employees are State employees. §10-104 (Supp. 1986) and §10-116 (Supp. 1986). The power to accept associations as MDIF members is subject to approval by the State Division of Savings and Loan Associations in §10-111

(Supp. 1986).

Additionally, by insuring depositor accounts and preserving the liquidity of member institutions, MDIF is serving an important public purpose associated with the State's exercise of the police power for the general welfare of its citizens. See Veix v. Sixth Ward Building and Loan Assoc., 310 U.S. 32 (1940); Noble State Bank v. Haskell, 219 U.S. 104 (1911); Assaria State Bank v. Dolley, 219 U.S. 121 (1911); Md. Fin. Inst. Code Ann., §8-102 (Declaring that the savings and loan business is affected with the public interest and shall be "supervised as a business affecting the economic security and general welfare of the people of this State."); see also Lankford v. Platte Iron Works Co., 235 U.S. 461 (1915) (Holding a decree directing a State banking board to repay a deposit in an insolvent bank out of a legislatively-created depositors' guaranty

fund financed by associations' contributions to be a suit against the State barred by the Eleventh Amendment).

Finally, every state and federal court that has examined MDIF's status as an insurer and regulator has concluded that it is a State agency. See Chevy Chase Savings and Loan, Inc. v. State, 306 Md. 384, 393, 509 A.2d 670, 674-675 (1986); United Wire v. State Deposit Ins. Fund, 307 Md. 148, 151, 512 A.2d 1047, 1048 (1986); Levitt v. MDIF, 643 F.Supp. 1485 (E.D.N.Y. 1986)("MDIF is an agency of the State of Maryland under the Eleventh Amendment"). Thus, MDIF, just like the State itself, is entitled to the protection of the Eleventh Amendment in this case.

2. The State has not waived its Eleventh Amendment immunity.

> "The test for determining whether a State has waived its immunity from federal court jurisdiction is a stringent one. . . .[I]n order for a state statute or constitutional pro-

> vision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in federal court." Atascadero State Hosp. v. Scanlon, 105 S.Ct. 3142, 3147 (1985).

In contending that the General Assembly of Maryland by statute waived MDIF's entitlement to Eleventh Amendment protection, John Hanson has failed to come to grips with this test, let alone to apply it in a correct fashion.

Simply because MDIF inherited MSSIC's power to sue and be sued and undertook a limited assumption of certain MSSIC obligations, see Chevy Chase Savings and Loan, Inc. v. State, 306 Md. at 409, 509 A.2d at 683 ("Under §4 of Ch. 6 [Laws of 1985, 1st Special Session], MDIF assumed MSSIC's obligations, including executory contracts, only to the extent that a given obligation was consistent with Ch. 6."), reveals absolutely no intent to subject the agency to suit in federal court. The language of the

1985 statute creating MDIF is simply not "an unequivocal waiver specifically applicable to federal court jurisdiction," Atascadero State Hosp. v. Scanlon, 105 S.Ct. at 3147, and thus cannot be held to have waived the Eleventh Amendment.

3. The Eleventh Amendment bars suit against the State and its agencies, even when the claim is for the "return of seized property".

When the State and its agencies, as opposed to one of its officers, is named as a defendant in federal court, it makes no difference what the basis is for the litigant's constitutional claims or what relief he or she prays. See Pennhurst State School and Hospital v. Halderman; Corey v. White. The Eleventh Amendment does not, as John Hanson argues, only protect a state from liabilities that must be paid from funds in the state treasury. See Corey v. White, 457 U.S. at 90, n.2. Moreover, it cannot be limited to

federal suits, such as the case at bar, that would interfere with administration of a state policy or statute. See Lankford v. Platte Iron Works Co., 235 U.S. 461, 476 (1915). Rather, the Eleventh Amendment is a restriction on the federal judicial power "based in large part on 'the problems of federalism inherent in making one sovereign appear against its will in the courts of the other.'" Pennhurst State School and Hospital v. Halderman, 465 U.S. at 100 (quoting from Employees v. Missouri Public Health Dept., 411 U.S. 279, 294 (1973)).

Nor does the State's Eleventh Amendment defense disappear in the face of John Hanson's allegations that the Insurance Fund monies sought are not State funds but the institution's money, of which MDIF is a mere custodian. Chapter 6, Laws of 1985 (1st Special Session), placed MSSIC funds and assets within State custody, control, and

discretion for its use to fulfill various public purposes, including the insurance of depositor accounts, the payment of depositor losses, and preservation of the liquidity of member institutions. In addition, the State has appropriated its own monies to this Fund and has used or plans to use Insurance Fund monies to free up frozen depositor accounts at troubled institutions.

Finally, a contention similar to that of John Hanson's was soundly rejected in Lankford v. Platte Iron Works Co., where the Court ordered the dismissal of a suit against members of a state banking board for payments from a "depositors' guaranty fund", despite the contention that "the property is that of the contributing banks and is accumulated in a fund for the security of their respective depositors. . ." 235 U.S. at 473. Noting that the funds in question, although ultimately destined for depositors, were under

the management of the State, the Court said:

> "The fund, having this ultimate destination, does not take its administration from the officers of the state, or subject them to judicial control. We cannot assume that it will not be faithfully managed and applied." 235 U.S. at 475.[6/]

For all of these reasons, this action is one against the State and its agencies within the meaning of the Eleventh Amendment and, because the State's immunity has not been waived, the courts below correctly concluded that John Hanson's claims should be dismissed.

6/ Even if John Hanson had named State officers as defendants, rather than the State itself and one of its agencies, the State's management and control of MDIF funds, coupled with the fact that if petitioner obtained the requested relief, the State would be obliged to make greater appropriations from the state treasury on behalf of depositors, would make this suit one against the State and thus barred by the Eleventh Amendment. See Larson v. Domestic and Foreign Commerce Corporation, 337 U.S. 682, 691, n. 11 (1949); Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670, 689-90 (1982).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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